HUMAN RIGHTS IN ADMINISTRATIVE PROCEEDINGS: A QUEST FOR APPROPRIATE EVIDENTIARY STANDARDS

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I. INTRODUCTION

This article will examine the standard of evidence required in proceedings of a judicial nature held not in court, but before various administrative authorities. The judicial nature of these proceedings derives from their involvement with the deprivation of human rights and liberties.

There are two approaches to examining standards of evidence. The first approach prefers the public's interest over the interest of the individual. The second approach places the interests of the individual at the center and therefore emphasizes his or her interests as more valuable.

The implications of each approach are obvious. The first approach typically demands a lower standard of proof. Moreover, this approach does not always require a judicial forum, but is often satisfied by procedures held by any administrative authority. As for the second approach, its application requires setting a heightened standard of proof when human rights are at stake. Furthermore, the forum that utilizes the second approach in evaluating the potential harm to these rights has to be judicial or quasi-judicial. At the very least, the heightened standard requires, as in Israel, that when administrative authorities make decisions concerning human rights, the individual involved must have an opportunity to appeal to a court or some other judicial authority.

Indeed, it seems that the Israeli Supreme Court has adopted the second approach. This approach is reflected in the Israeli Supreme Court's decision in the *Sajadiyeh*[1] case, where the Court acknowledged the problematic nature of any decision by a non-judicial authority that deprives an individual's liberty. The Court stated that this type of decision is very severe,[2] and is allowed only in circumstances involving the public order.[3]

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1. H.C. 253/88, Sajadiyeh v. Minister of Defense, 42 (3) P.D. 801.

2. *Id.* at 821.

3. In *Sajadiyeh*, the Israeli Court referred to "definite security reasons" involved in issuing an administrative detention order. The Court also stated that the appropriate level of judi-

As to standards of proof in general, there are three accepted standards: (1) the *preponderance-of-the-evidence* standard, that is mostly used in civil cases and requires that the existence of a fact be more probable than its non-existence (meaning that the evidence must be more than fifty percent likely to be accurate); (2) the *beyond-a-reasonable-doubt* standard, utilized in criminal cases, that requires an approximately ninety-five percent probability that the evidence is accurate (this standard is justified on the premise that society prefers that a guilty man go free rather than an innocent man be convicted); (3) the third standard, which lies somewhere between the preponderance standard and the reasonable doubt standard, is the *clear-and-convincing-evidence* standard.[4] The clear-and-convincing-evidence standard requires that the evidence be at least seventy percent accurate, meaning that the facts asserted must be highly probable. In the United States, the clear-and—convincing standard has been applied in a number of civil controversies and in hearings[5] involving civil commitment,[6] deportation,[7] termination of paternal rights,[8] and denaturalization.[9] Courts, however, have had a difficult time defining this standard.

In Israel, the existence of the clear-and-convincing standard is questionable. This article will examine the use of such a standard and suggest a way to define an intermediate standard that can be applied in non-judicial administrative proceedings that often involve decisions dealing with human rights.

The discussion will first focus on the standard of proof utilized in certain Israeli administrative practices conducted by the military and security authorities. These administrative practices include house demolitions, administrative detentions, and administrative deportations. The power to conduct such practices was granted to the Israeli military as a result of the emergency situation declared in Israel and therefore is quite unique to Israel. The discussion will then examine the standard of evidence in other practices that are more common worldwide, and will particularly focus on two types of practices: involuntary commitments and deportation hearings. These last two practices will be discussed from the point of view of American law. Finally, a suggestion will be made regarding the appropriate intermediate standard that should be employed in Israeli administrative practices that deal with human rights.

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cial review that should be applied in these cases is to examine whether the decision of detention reflects the right balance between security needs and the fundamental tendency by which an individual's liberty has to be respected. *Id.*

4. Louis Rabaut, Case Note, Addington v. Texas, *441 U.S. 418 (1979)*, 57 J. URBAN L. 651, 654-55 (1980); Scott M. Brennan, Note, *Due Process Comes Due: An Argument for the Clear and Convincing Evidentiary Standard in Sentencing Hearings*, 77 IOWA L. REV. 1803, 1804-05 (1992) (discussing the three standards of proof).

5. Brennan, *supra* note 4, at 1804.

6. Addington v. Texas, 441 U.S. 418, 433 (1979).

7. Woodby v. I.N.S., 385 U.S. 276, 285-86 (1966).

8. Santosky v. Kramer, 455 U.S. 745, 768-70 (1982).

9. Chaunt v. United States, 364 U.S. 350, 353 (1960).

II. INDIVIDUAL RIGHTS AND THREATS TO NATIONAL SECURITY

Since declaring independence, Israel has been under a constant emergency situation because of external and internal threats to the State's existence. Thus, Israel was compelled to take measures to provide its executive authority the means to protect the State's safety.[10] One example of such emergency measures was the Defense (Emergency) Regulations enacted by the British in Palestine in 1945.[11] Inevitably, the exercise of such emergency regulations and other legal methods can lead to human rights violations.

In Israel, the right to self-dignity and the right to equality are examples of human rights that must not be violated, even under emergency situations.[12] Other rights are more vulnerable; for instance, the right to due process may be violated when an emergency exists and there is no time to follow the necessary procedures. Freedom of speech[13] and movement[14] also may be severely curtailed in urgent situations, which may in turn lead to a decrease in judicial supervision.

Yet, despite security needs, one cannot imagine that in a modern democratic State, individuals will be deprived of fundamental rights without a proper opportunity to be heard. This notion was true before the enactment of the Basic Law: Human Dignity and Liberty,[15] and has become even more compelling with the enactment of that Basic Law and the resulting constitutional revolution in Israel.[16]

The following sections will examine several practices that have evolved in Israel due to the continued emergency situation of the last fifty years.

A. House Demolitions

The authority to demolish and to seal up homes is a harsh example of emergency action that can amount to human rights violations. When home demolition occurs it usually involves collective punishment, as both the offender and the offender's family suffer. In most cases, the actual offender is

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10. Emanuel Gross, *Criminal Code in Time of Emergency*, 3 MISHPAT UMIMSHAL 263 (1995) (Hebrew).

11. 1442 Palestine Gazette, Supp. No. 2, at 1055 (Sept. 27, 1945) [hereinafter 1442 Palestine Gazette] (Hebrew).

12. RUTH GAVIZON, HUMAN RIGHTS IN ISRAEL 136-37 (1994) (Hebrew) (discussing that the use of the Defense (Emergency) Regulations (DER) to prevent a man from bringing his case before court is prohibited by the Basic Law: The Government).

13. H.C. 73/53, "Kol-Ha'am" Ltd. v. Minister of the Interior, 7 P.D. 871; arts. 86-101 of the 1945 Defense (Emergency) Regulations.

14. 1945 Defense (Emergency) Regulations, arts. 111, 112, 122-27.

15. Basic Law: Human Dignity and Liberty, 1992 S.H. 150. The full text of this law is reprinted in 31 ISRAEL L. REV. 21-23 (1997). *See also* H.C. 230/80, Kawasme v. Minister of Defense, 35 (3) P.D. 113.

16. Until that time, human rights were derived from the powers of the official authority. Now the powers of the official authority are derived from the human rights laws. In other words, human rights became supreme law.

dead or in jail and the home demolition action is specifically carried out to hurt the members of the offender's household.[17] In this way, the authorities also achieve their goal of deterring potential security offenders by making them bear in mind the incidental consequences of their proposed action and showing that their families may suffer.

The Israeli administrative authority applies this measure before the alleged offender is convicted, typically, very soon after the offense.[18] Article 119 of the 1945 Defense (Emergency) Regulations (1945 DERs) provides the legal authority for house demolitions.[19] The breadth of the provision affords tremendous discretion to the Military Government, as the provision allows the Military Government to issue demolition orders as an exercise of administrative authority without recourse to judicial proceedings. It requires only that the military commander "ha[ve] reason to suspect" and "[be] satisfied" that an offense was committed.[20]

In supervising this proceeding, the courts do not consider whether the offender filed a criminal appeal; the court merely decides whether demolition orders meet the relatively lenient standards for review of administrative actions. Moreover, the demolitions do not replace criminal punishment, as the offenders are prosecuted for the same offense that gave rise to the demolition.[21] Under Article 119 of the 1945 DERs, the administrative authority can issue demolition orders for homes that were used directly in the commission of an offense as well as for those houses in which the offenders simply resided.

The Military Government is responsible for governing occupied territories. Therefore, it must fulfill its duty to minimize violence. The Israeli Gov-

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17. C.A. 4772/91, Khizran v. Military Commander of Judea and Samaria Region, 46(2) P.D. 150; H.C. 2006/97, Janimat v. General Commanding the Central Command, 51(2) P.D. 651.

18. GAVIZON, *supra* note 12, at 143.

19. 1442 Palestine Gazette, *supra* note 11, at 1055, 1089, *as amended by* 1600 Palestine Gazette Extraordinary, Supp. No. 2, at 1159 (July 31, 1947) [hereinafter 1600 Palestine Gazette]. Art. 119 states, in part:

> (1) A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, detonated, exploded or otherwise discharged, or any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offense against these Regulations involving violence or intimidation or any Military Court offense; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything in or on the house, the structure or the land.

The translation of Art. 119 is taken from Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT'L L. 1, 15 (1994).

20. Simon, *supra* note 19, at 16 (quoting art. 119 of the DER, 1442 Palestine Gazette).

21. *Id.* at 16.

ernment explains the demolition policy as a necessary practice, positing that while the criminal system does not adequately deter security offenders, demolitions have great deterrent effect because they are immediately visible punishments.[22]

In *Hamed v. Military Commander of Judea and Samaria Region*,[23] the Israeli Supreme Court broadened the demolition doctrine by relaxing the standard of evidence required for demolition orders. The Court asserted that a Military Commander may exercise his powers under Article 119 when he "is satisfied" that an offense was committed.[24] The Court was not concerned with the fact that the information was obtained from the offender in the course of his interrogation.[25]

In *Khamri v. Military Commander of Judea and Samaria Region*,[26] the Court further broadened the prior practice of merely sealing homes into one allowing demolitions as well. The decision relied on the principle that the Court's review is limited to the lawfulness of administrative actions. Even though the Court emphasized the harshness of the measure and declared that it should only be applied in special circumstances following strict investigation and consideration, it concluded that a reasonable Military Commander may apply the measure.[27]

In *Association for Civil Rights in Israel (ACRI) v. Commander of Central Command*,[28] the Israeli Court's attitude appeared to change. Before this ruling, most demolitions were carried out in the middle of the night, with no possibility for appeal. The *ACRI* ruling relied on the right to be heard. Accepting this claim, the Court ordered that before the Military Government can demolish a house, the family living there must receive notice and the opportunity to initiate administrative proceedings as well as the opportunity to appeal the administrative determination to the Supreme Court.[29]

Another case that reflects the change in the Court's point of view is *Khizran v. Military Commander of Judea and Samaria Region*.[30] Justice Heshin dissented in that case, stating that the demolition of an entire house should be prohibited because it inflicts punishment on the members of the offender's family. Previously, the Justice had rejected the notion that permitted the demolition of an entire house as long as the offender's room could be considered "inseparable" from the rest of the house.[31] Justice Heshin con-

22. *Id.* at 10.
23. H.C. 22/81, 35 (3) P.D. 223.
24. *Id.* at 224.
25. *Id.*
26. H.C. 361/82, 36 (3) P.D. 439.
27. *Id.* at 444. *See also* Simon, *supra* note 19, at 29-30.
28. H.C. 358/88, 43 (2) P.D. 529.
29. *Id.* at 540-41.
30. H.C. 4772/91, 46 (2) P.D. 150.
31. H.C. 2665/90, Qarabsa v. Minister of Defense (unpublished).

cluded that the Military Government may not seal or destroy an entire house.[32]

The *Khizran* dissent was soon followed by *Turkeman v. Minister of Defense*.[33] In *Turkeman*, the Court introduced a proportionality test, meaning that the Military Commander must consider not only the illicit action that is being deterred, but also the harm caused to those affected by the deterrent measure. Because destroying an entire house would inflict harm on the other (supposedly innocent) family members, "a disproportionate—and therefore unreasonable—measure."[34]

The cases described above demonstrate the developing recognition and concern for non-suspects whose human rights are affected by demolitions. The Court eventually ruled that before a demolition order is issued, the members of the offender's family should be given enough time to obtain counsel and to be heard by the Military Commander, and, if necessary, petition the High Court of Justice.[35] Moreover, the Court stated that, considering the irreversible nature of the demolition, one must take into account the existence of innocent people living near the home of the offender.[36] On the other hand, the need for an efficient deterrent measure to maintain order must remain a consideration.

Undoubtedly, the Court took steps forward in considering not only security concerns but also the interests of the offenders' families. The Court, however, should have gone further and redefined the standard of proof that is to be applied in home demolition cases. A specific standard would ensure that Military Commanders conduct adequate investigation and gather essential evidence before ordering a home demolition. By defining a heightened standard of proof, the Court could have assured greater protection for human rights and would have prevented the Military Commander from issuing demolition orders too frequently.

Furthermore, the Court should have defined adequate methods of gathering evidence that could establish a proper factual basis for a house demolition order. The methods exercised while investigating, gathering information, and examining the findings affect the reliability of the evidence upon which the decision is based. Therefore, if the investigation or examination methods do not meet the necessary standard, the decision made on the basis of the evidence gathered may well be mistaken. The Court should have guided the authorities in both matters: the standard of evidence required in house demolition cases and the appropriate investigation and examination methods to establish this standard.[37]

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32. *Khizran*, 46 (2) P.D. at 159-61.
33. H.C. 5510/92, 48 (1) P.D. 217.
34. *Id.* at 220.
35. *Commander of Central Command*, 43 (2) P.D. at 540-41.
36. *Khizran*, 46 (2) P.D. at 159-61.
37. 6055/95 Tsemach v. Minister of Defense (not yet published) § 24 (Zamir, J.).

B. Administrative Detentions

Another practice applied in Israel is administrative detention. This practice is an exception to the principle that no man should be deprived of his liberty without due process of law.[38] As explained, in times of emergency and national crisis, the legislature frequently abandons the basic principles of its legal system for security reasons.[39] Under such circumstances, the fundamental principle of due process is replaced by emergency legislation, which enables the administrative authorities to deprive a person of liberty in an administrative procedure, without being convicted in a criminal proceeding.[40]

While the intent of this article is to examine the practice of administrative detention in Israel, it should be mentioned that this practice has been carried out, at times, in a very harsh and careless manner outside of Israel.[41] A very extreme example arose during the course of World War II, when, despite constitutional guarantees, approximately 110,000 residents and citizens of the United States were exiled from their homes and placed in detention camps solely because of their national origin.[42] The U.S. Supreme Court condoned this extreme action when it found that the practice did not contradict the U.S. Constitution in any way.[43]

Administrative detention is a harsh measure, as it involves the denial of many important human rights:[44] the detainee is deprived of liberty without a fair trial, the right to move freely, and the right to minimal due process.[45] The problematic nature of administrative detention becomes very apparent when comparing it to arrest before criminal trial.[46] An arrest occurs only after *prima facie* evidence has connected a person to the offense committed. The person is detained only if his release might endanger public safety. Moreover, the arrested person is given the opportunity to confront the proof against him before a court of law. An administrative detention, however, is not part of a criminal proceeding, as its purpose is to prevent a future event rather than to inflict punishment for a committed offense.

In Israel, the denial of liberty involved in administrative detention should be considered seriously, especially since the enactment of the Basic Law: Human Dignity and Liberty, which gave those human rights constitu-

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38. This principle has been recognized in the United States. U.S. CONST. Amends. V & XIV; *see also* Basic Law: Human Dignity and Liberty, 1992, S. H. 150, § 11 (Isr.).

39. Eyal Nun, *Administrative Imprisonment in Israel*, 3 PLILIM 168, 172-73 (1992) (Hebrew).

40. Yehuda Weiss, *Administrative Detention—Trends, Procedure and Evidence*, 10 MISHPAT AND TZAVA 1, 4 (1989) (Hebrew).

41. Nun, *supra* note 39, at 168; Weiss, *supra* note 40, at 4; GAVIZON, *supra* note 12, at 143.

42. Korematsu v. United States, 323 U.S. 214 (1944).

43. *Id.* at 219.

44. GAVIZON, *supra* note 12, at 140.

45. Gross, *supra* note 10, at 269.

46. GAVIZON, *supra* note 12, at 140.

tional protection.[47] Therefore, a consideration of detention involves the just balancing of public security and safety interests against the rights and liberties of the detained.

The legal foundation of administrative detentions in Israeli law is the Emergency Powers (Detentions) Law of 1979 (1979 Detention Law), which replaced Section 111 of the 1945 Defense (Emergency) Regulations.[48] The 1979 Detention Law led to major changes in the practice of administrative detentions. The decision to issue an administrative detention order is now made by the Minister of Defense[49] rather than the Military Commander. In addition, Section one of the 1979 Detention Law restricts the authority to issue such an order to times of declared emergency.[50]

A major improvement, instituted by the 1979 Detention Law, concerns judicial supervision of the administrative detention practice. Section Four establishes that a detention order will be brought for review before the President of the District Court within 48 hours, and he may confirm, cancel, or shorten the order. If the detainee is not brought before the District Court within forty-eight hours, he will be released. Furthermore, the detainee now has the ability to appeal the lawfulness of the detention to the Supreme Court. The Minister of Defense may order detention for no more than six months.[51] This period may be extended, but the extension requires judicial approval as well.[52] The order must be examined periodically by the judge after three months. Indeed, we may consider these judicial-review guarantees as great improvements, as these changes are intended to prevent the administrative authorities from abusing their power to order detentions.

Section two(a) gives the Minister of Defense the authority to issue an administrative detention when he has "a reasonable foundation to assume that for reasons of the State's safety or the public safety a certain man should be held in detention."[53] This raises the question of the standard of proof and adequacy of evidence necessary in this kind of procedure.

There are two types of evidence that could justify a detention: (1) evidence about the potential detainee's past actions and offenses that establishes, to a degree of certainty, the possibility that this person is bound to

47. Gross, *supra* note 10, at 274.

48. 1945 Defense (Emergency) Regulations, § 111 (1) ("A military Commander may by order direct that any person shall be detained in such place of detention as may be specified by the Military Commander in the order").

49. With one exception mentioned in Emergency Powers (Detentions) Law of 1979, § 2(b).

50. As mentioned above, an emergency has been declared in Israel continuously since its declaration of independence. For this reason many critics do not consider Section one of the Emergency Powers (Detentions) Law of 1979 to be much of an improvement. Yet, since the reenactment of the Basic Law: The Government in 1996, the approval of the Kenesset [Israel legislator] is required in order to enable the continuation of the declared emergency situation.

51. Emergency Powers (Detentions) Law of 1979, § 2(a).

52. *Id.* § 2(b).

53. *Id.*

commit similar offenses in the future; and (2) evidence that indicates a specific intention to commit a certain offense in the near future.[54]

The Minister of Defense must apply his discretion according to the objective test of "the reasonable man."[55] In the case of *Shahin v. Military Commander of Gaza Region,*[56] the Court ruled that the evidence to support an administrative authority's decision need not be of the character of admissible evidence required in proceedings before courts, however, "a rumor or unchecked assumption is not satisfying enough."[57]

In *Agbariah v. State of Israel,*[58] the Israeli Supreme Court demanded evidence that indicated the existence of a real and serious danger, and proof that not issuing the detention order may lead to action that involves danger to the safety of the State and the public.[59] In *Agbariah*, the Supreme Court ultimately approved the detention decision of the Minister of Defense, who relied on a summary of the factual basis of the specific case made by his assistants.[60] Under *Agbariah*, the Minister, himself, is not required to review the entire factual history before making a decision to detain a person and deprive his liberty without trial. This is especially significant in light of the fact that the Minister can extend the detention by six months "from time to time."[61] The Court held that the Minister could utilize this extension authority more than once.[62] Therefore, there exists at least the theoretical risk that a person could be detained for a very long period, without trial, pursuant to administrative measures.[63]

These concerns might be alleviated to some extent if we bear in mind that the decision of the Minister is reviewed by the Israeli District Court, as explained above. Judicial review of the Minister's decision restricts his authority in a few ways. First, the Supreme Court has held that the purpose of administrative detention is not to punish a person for past actions; rather, its purpose is to prevent the future danger this person is expected to cause to public safety.[64] Second, courts have emphasized that administrative detention does not replace punishment and when a person can be charged in criminal proceedings, the detention authority must not be executed[65] since it involves

54. Nun, *supra* note 39, at 169-70.
55. *Id.* at 185.
56. H.C. 159/84, 39 (1) P.D. 309 (1984).
57. *Id.* at 327.
58. H.C. 1/88, 42 (1) P.D. 840.
59. *Id.* at 845.
60. *Id.* at 843-44.
61. Emergency Powers (Detentions) Law of 1979, § 2(b).
62. H.C. 2/86, Ploni [Doe] v. Minister of Defense, 41 (2) P.D. 508, 511.
63. Weiss, *supra* note 40, at 16.
64. H.C. 1/82, Kawasme v. Minister of Defense, 36 (1) P.D. 666, 669.
65. *Id.*; H.C. 2/82, Lerner v. Minister of Defense, 42 (3) P.D. 529, 531; H.C. 1/80 Kahane v. Minister of Defense, 35 (2) P.D. 253, 259; Ashkenazi, *Emergency Powers (Detentions) Law as a Model for Reform of Defense Regulations*, 11-12 LAW & ARMY 121, 128-29 (1991) (Hebrew).

deprivation of human liberty without trial. Furthermore, the Court ruled that in determining whether to exercise this measure, its severity should be taken into consideration, and that its exercise can be justified only as a last resort and not as a first one.[66]

The Court's attitude has evolved regarding the scope of its role in reviewing the Minister's discretion.[67] At first, the Court took a minimalist position, stating that it could review only the legality of the Minister's decision and not its efficiency or its security justification, as the Court could not replace the Minister's considerations with its own judgments.[68] Today the Court holds a more expansive view, stating that its review aims to be wider, so that a court can exercise its own discretion and can examine not only the legality of the detention, but also the merits and the degree of essentiality of such an action to accomplish the goals stated in section two of the 1979 Detention Law.[69]

Indeed, the Court's supervision, especially in its expanded form, may have a very positive effect on the protection of human rights during the detention process. Yet, the rights of the potential detainee are not totally ensured even in these proceedings before a court. The 1979 Detention Law gives the Minister of Justice the power to restrict the right to legal representation by licensed military court defense counsel.[70] In addition, the proceedings are not public, but are held behind closed doors.[71]

Although the 1979 Detention Law furthers the protection of human right in many ways, Section six contains a significant limitation on the right to due process. Under Section six, the administrative authority is permitted to deviate from the evidence law when disclosure of evidence may jeopardize the public or state safety. Moreover, when circumstances warrant, evidence can be admitted without presenting it to the detainee or the defense counsel and can even be admitted outside of their presence.[72] Given this possibility, Security Authorities often find administrative detention much more convenient than criminal prosecution.[73] The Security Authorities also often claim that the information regarding the detention is confidential, and therefore request to hold the proceedings without the presence of the detainee.

Although the burden to convince the Court that the factual material should be kept confidential lies on the Authorities, usually even a remote possibility of exposing sources of information justifies keeping this informa-

66. H.C. 3280/94 Federman v. Military Commander of Judea and Samaria Region (unpublished).

67. Ashkenazi, *supra* note 65, at 130-31.

68. *Kahane*, 35 (2) P.D. at 257-58.

69. H.C. 2/86, Ploni [Doe] v. Minister of Defense, 41 (2) P.D. 508, 515-16.

70. Emergency Powers (Detentions) Law of 1979, § 8(b).

71. *Id.* § 9.

72. *Id.* § 6(a).

73. Weiss, *supra* note 40, at 8-9.

tion confidential.[74] In actuality, an alleged need for confidentiality will very often prevent a defense counsel from having the opportunity to stage an efficient cross-examination and will often prevent the detainee from seeing the evidence held against him. Consequently, the responsibility of the Court to evaluate the information and evidence is much greater. In particular, when hearsay is presented as evidence and the source of the information does not appear in court, the Court has only the Authorities' evaluation of that source.[75] When evaluating the admission of hearsay evidence, the Israeli Supreme Court has applied a standard that requires the anticipated danger to public safety be severe enough to make it essential to deprive the detainee of the right to a proper defense.[76] A possible but remote and marginal danger to the State's security is not sufficient to keep the evidence confidential.[77] Hence, administrative detention is justified in cases where detention is necessary to prevent a proven danger and the detainee, for some reason, cannot be convicted in criminal proceedings.[78] In these cases, the necessity justifies maintaining the confidentiality of the evidence as well.[79]

In the matter of administrative detentions, it seems that the Israeli Court properly considered the contradicting interests of public security and safety on the one hand, and the rights of the detainee on the other. The Court determined that the Minister of Defense must establish the degree of probability to a "close certainty" evidence standard before he can exercise his detention authority.[80]

Although the administrative authorities in Israel have the broad discretion to order harsh detention measures, the 1979 Detention Law contains changes that place some restraint on this discretion. The judicial supervision that has become a part of the detention procedure limits the discretion of the administration authority. Although uncertainty still exists as to the exact level of evidence required, the Israeli Court has progressed by adopting a "close certainty" evidence standard for detentions, and it seems right to adopt similar standards regarding other emergency arrangements.[81]

C. Deportations

The last Israeli administrative security practice that needs to be examined is the issuing of Deportation Orders. The authority to issue deportation

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74. *Id.*

75. *Id.* at 13-14.

76. H.C. 1/80 Kahane v. Minister of Defense, 35 (2) P.D. 253, 259.

77. Weiss, *supra* note 40, at 13.

78. Mainly because it is impossible to disclose the informants or the way of gathering the evidence.

79. Nun, *supra* note 39, at 171.

80. H.C. 3280/94, Federman v. Military Commander of Judea and Samaria Region (unpublished); Rabbi Ginzburg v. Minister of Defense and Prime Minister, 50 (3) P.D. 221-22 (1996).

81. Ashkenazi, *supra* note 65, at 152.

orders is derived from Article 112 of the 1945 Defense (Emergency) Regulations.[82] In the past, Article 112 authorized the Minister of Defense to issue a Deportation Order against any person in Israeli territory without trial, without properly proving the person guilty, and without giving the person a real chance to appropriately defend himself by challenging the evidence raised against him.[83] This very broad and disturbing authority was canceled by Article twelve of the 1979 Detention Law. The broad deportation authority, however, was changed only with respect to citizens of Israel; the broad authority can still be exercised upon the residents of restricted occupied territories.[84]

The Israeli Supreme Court ruled that while exercising authority under Article 112, the Minister[85] must take into consideration provisions of Article 108.[86] Article 108 states that an order will not be issued unless the Minister of Defense believes that "it is necessary or expedient to make the order for securing the public safety, the defence of Palestine, and/or the maintenance of public order."[87]

In the past, the Israeli Supreme Court tended to limit the degree of its review over the Minister's decision,[88] and avoided reviewing the legitimacy of the Minister's considerations.[89] More recently, the Court seems to have changed its approach. With an awareness that it is difficult to prove that a deportation order is unlawful, the Court adopted the position that a person who is attempting to assert his rights should not have his rights limited by burdening him with too strict a standard.[90]

Regarding the nature and standard of evidence required to justify a deportation order, the Court held that a rumor or an unchecked assumption did not satisfy the standard.[91] The deportation decision should be based on factual information that a "reasonable man" would find adequate (while taking into account the content and the source of the information).[92] Furthermore, the Court stated that given the severity of the administrative deportation practice, the administrative authority must be convinced that the facts establishing the need for deportation are "clear, unequivocal, and convincing."[93]

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82. 1442 Palestine Gazette, *supra* note 11, at 1085.

83. Gross, *supra* note 10, at 274.

84. Emergency Powers (Detentions) Law of 1979, § 8(b).

85. H.C. 240/51, Al Rahman v. Minister of the Interior, 6 P.D. 364 (stating that the authority to order deportation was given only to the Minister of Defense).

86. H.C. 97/79, Abu Awad v. Regional Commander of Yehuda and Shomron, 33 (3) P.D. 309 (1979).

87. 1442 Palestine Gazette, *supra* note 11, art. 108.

88. Ashkenazi, *supra* note 65, at 138.

89. H.C. 17/71, Mrar v. Minister of Defense, 25 (1) P.D. 141, 146.

90. H.C. 792/88, Mator v. West Bank Commander, 43 (3) P.D. 542; Ashkenazi, *supra* note 65, at 140.

91. *Mator*, 43 (3) P.D. at 548.

92. Weiss, *supra* note 40, at 15.

93. H.C. 22/89, Mator v. Regional Commander of Yehuda and Shomron, 43 (2) P.D.

The discussion regarding the admission of confidential evidence in administrative detentions also applies in deportation cases.[94] The Minister of Defense has the power, under Article forty-four of the Evidence Order [New Version] 1971, to present to the Court a sealed certificate claiming that the safety of the State will be compromised if the evidence is revealed.[95]

As indicated earlier, the Court should take into consideration the impact of keeping information from the deportee on the deportee's ability to defend himself. The Court has stated that the potential deportee should be informed, in general, about the actions attributed to him, and the reasons for issuing a deportation order against him.[96] In addition, the Court ruled that a potential but remote and marginal risk to the State's safety cannot justify the refusal to reveal evidence.[97] The Court has ruled that information may remain confidential if disclosure may create a significant security risk or a real and substantial risk of exposing and endangering confidential intelligence sources, such that the need to reveal evidence to ensure justice is not paramount over the security interest in non-disclosure.[98]

The recent court rulings demonstrate that the Israeli Court has made an attempt to protect the potential deportee's rights by examining the evidentiary foundation for the decision in administrative deportations.[99] Furthermore, the Court, today, tends to examine whether the right to be heard has been appropriately respected.[100] The Court has held that proceedings before the Counseling Board, which reviews the deportation orders, must be public and that the deportee should be given the opportunity to present witnesses.[101] The Court has also held that unless security concerns make it impossible, a deportation order cannot be issued unless the deportee has had notice, an opportunity to be heard and an opportunity to appeal before being deported.[102] This ensures an examination of the justification for the deportation before the order is executed.[103]

Despite all of the above and other human rights guarantees that the Court has tried to include in its decisions, the Israeli Court still approved the

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221, 222-23 (1989) (relying on the holding in H.C. 159/84, Shahin v. Regional Commander of Gaza, 39 (1) P.D. 309, 327).

94. Weiss, *supra* note 40, at 12-13.

95. Evidence Order, art. 44 (1971) (Isr.) (Hebrew).

96. H.C. 497/88, Shahsheer v. West Bank Commander, 43 (1) P.D. 529.

97. *Id.* at 539.

98. Mator v. Regional Commander of Yehuda and Shomron, 43 (2) P.D. 221, 222-23 (1989).

99. 2 AMNON RUBINSTEIN, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 1179-80 (Amnon Rubinstein & Barak Medina, eds., 1996).

100. *Id.*

101. H.C. 103/92, Bolous v. Counseling Board, 46 (1) P.D. 466; H.C. Abu Samhadna v. Counseling Board, 46 (1) 626.

102. H.C. 5973/92, The Association for Civil Rights in Israel v. Minister of Defense, 47 (1) P.D. 268, 289.

103. H.C. 230/80, Kawasme v. Minister of Defense, 35 (3) P.D. 113; *The Association for Civil Rights in Israel*, 47 (1) P.D. at 289.

exercise of this authority in a very extreme decision where the security authorities deported 415 residents of the occupied territories.[104] In *The Association for Civil Rights in Israel v. Minister of Defense*[105] (Civil Rights Deportation case), 415 residents were deported because they were suspected of being members of the Hamas and the Islamic Jihad terrorist organizations.[106] The Civil Rights Deportation case is an example of the Court's tendency to refrain from intervening when faced with possible security issues.[107] In that case, the Security Authority carried out the deportation by issuing individual orders without preliminary notice.[108] Moreover, the Security Authority issued a general order that was later determined to be illegal.[109] The Israeli Supreme Court disqualified the general order as it did not afford a right to a preliminary hearing.[110] The Court's determination, however, had no effect on the actual outcome, as the deportations were approved insofar as the Court stated that these orders were based upon specific information regarding each deportee; a factual foundation was established for each and every deportation.[111] The fact that the deportation orders were allegedly individualized does not necessarily prove that the action was not a mass deportation. On the contrary, a number of factors suggest that the Security Authority's action constituted mass deportation even though mass deportations are prohibited by international law.[112] The number of deportees, the quick fashion in which the orders were issued, and the identification mistakes of potential deportees support the conclusion that the Security Authority's action amounted to a mass deportation. These factors also demonstrate that special consideration was not given to every deportation and that the examination of evidence was not adequately thorough, despite the harsh consequences.[113] The Court ruled that, although preliminary hearings were not held, the deportation orders were not final because there was a possibility for post-deportation hearings.[114] Yet, it makes a big difference whether the deportee is heard before or after being deported,[115] because if he is heard before, it may prevent the dep-

104. *The Association for Civil Rights in Israel*, 47 (1) P.D. at 289.

105. *Id.*

106. *Id.*

107. Leon Shelef, *Mass Deportation as a Failed Deterrent—Considerations of Criminal Law*, 4 PLILIM 47, 50 (1994) (Hebrew).

108. *Id.*

109. *Id.* at 55.

110. *The Association for Civil Rights in Israel*, 47 (1) P.D. at 285-86.

111. *Id.* at 281.

112. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 49 ("Individual or mass forcible transfer, as well as deportations of protected person from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.").

113. Shelef, *supra* note 107, at 52.

114. *Id.*

115. Mordechai Kremnitzer, *The Deportee Deported—A Few Comments on the Decision Involving the Deportee*, 4 PLILIM 17, 19-20 (1994) (Hebrew).

rivation of his rights and the forced expulsion from his homeland. Considering all of the above, this case raises the inevitable question of whether the Court actually believed that for each and every deportee there was "clear, unequivocal, and convincing evidence" that established deportation as the only way to prevent the danger posed by the deported individual.[116]

It is easy to protect the individual's rights in tranquil periods, but the heavy responsibility on the Court is to protect those rights in times of emergency. In the Civil Rights Deportation case, it seems that the Court deviated from the previously established standard of proof, and the implications of such a deviation are severe. Perhaps the Court should have set an even higher standard. In any event, the Court is not sending the right message to the administrative authorities when it does not follow the standard that it sets, and it does not emphasize the importance of thorough examination and investigation before allowing a deportation order.

III. OTHER NON-JUDICIAL PROCEEDINGS

The situations described above are quite unique and limited to Israel due to the constant emergency situation. There are, however, other types of non-judicial proceedings, that do not involve security matters, that are more common outside of Israel, and can involve the deprivation of human rights. The standard of proof required in these non-emergency cases must be considered. The non-emergency cases that will be discussed are cases of involuntary commitment,[117] deportation hearings,[118] denaturalization hearings,[119] and expatriation hearings.[120] In the United States, courts apply a clear-and-convincing-evidence standard of proof when reviewing these types of cases.

A. Involuntary Commitment

1. The United States

In *Addington v. Texas,*[121] the U.S. Supreme Court ruled that under the Due Process Clause of the Fourteenth Amendment, the standard of proof in proceedings for an involuntary, indefinite civil commitment must be greater than a preponderance of the evidence but does not necessarily have to be as great as the reasonable-doubt standard; the intermediate standard of clear and convincing evidence was thus determined to be constitutionally adequate.[122] In considering involuntary commitments, and in determining the

116. *Id.* at 21.
117. Addington v. Texas, 441 U.S. 418 (1979).
118. Woodby v. I.N.S., 385 U.S. 276 (1966).
119. Chaunt v. United States, 364 U.S. 350 (1960).
120. Gonzales v. Landon, 350 U.S. 920 (1955).
121. 441 U.S. 418.
122. *Id.* at 433; Rabaut, *supra* note 4, at 561.

standard of proof required in such proceedings, one must bear in mind the contradictory goals these proceedings aim to achieve: to protect society and the public welfare from dangerously-disordered individuals, as well as to care for these individuals and to protect their rights and liberties from unnecessary and unjustified harm.[123]

According to these goals, the State's right to commit individuals is justified under the *parens patriae power*,[124] meaning the State's paternalistic power and duty to care for incapable individuals, to protect such individuals from themselves, and to help incapable individuals to overcome their mental illness by providing treatment and rehabilitation.[125] The State's police power, which is the State's right and duty to protect the public health, safety, and welfare from dangerous and violent, mentally disturbed individuals, is another justification.[126] While exercising this power, the State must not oppress individuals beyond the extent necessary to accomplish the objective.

Indeed, although the power of the State may justify involuntary commitment, there are approaches that focus on an individual's rights[127] and emphasize an individual's right to live life without external intervention, especially in a democratic society. When a person is committed unwillingly, the person suffers the loss of liberty. Moreover, the person is deprived of many other rights such as the right to privacy, the right to live as a member of society, the right to live with family, and the right to move freely. Indeed, the Israeli Supreme Court has recognized involuntary commitments as "one of the severest and most oppressing forms of depriving [an] individual's liberty."[128]

In most cases the committed person's reputation is severely damaged, and the person is sentenced to live with the stigma of having been "mentally ill,"[129] even after being released. The "mentally ill" label may greatly reduce the committed person's chances of reintegration into society even when the person was erroneously committed. Therefore, the logical conclusion is that the standard of proof in these proceedings should be determined by balancing the respective interests involved.

Prior to the *Addington*[130] case, U.S. courts issued varying opinions regarding the question of standards of proof. A number of courts analogized the civil commitment proceeding to a criminal proceeding and required the

123. AMNON BEN-DROR, THE LAW OF PROTEGES 164 (1998).

124. Rabaut, *supra* note 4, at 655-56 (citing Addington v. Texas, 441 U.S. 419, 426); Dan Shnit, *Civil Commitment of the Mentally Ill in Israeli Law*, 8 TEL AVIV U. L. REV. 529, 532 (1982) (Hebrew).

125. O'Connor v. Donaldson, 422 U.S. 563 (1975). Despite this state power, the U.S. Supreme Court ruled that the state cannot commit an individual simply because he is mentally ill. *Id.* at 575.

126. Rabaut, *supra* note 4, at 656-57; Shnit, *supra* note 124, at 532.

127. BEN-DROR, *supra* note 123, at 160.

128. H.C. 196/80, Toledano v. State of Israel, 35(3) P.D. 332, 336.

129. BEN-DROR, *supra* note 123, at 161.

130. 441 U.S. 418.

beyond-a-reasonable-doubt standard,[131] as both cases involve a similar loss of liberty and stigmatization. Other courts utilized the preponderance standard.[132]

In *Mathews v. Eldridge,*[133] the U.S. Supreme Court pointed out the factors that should be considered in determining the required Due Process protections: (a) the private interest to be affected; (b) the risk of erroneous deprivation of the interest and the value of alternate safeguards; and (c) the Government's interest. Taking these factors into account, the *Addington* Court evaluated the standard of proof required for civil commitments.[134] The U.S. Supreme Court rejected the preponderance standard because the court concluded that the application of such a standard increased the likelihood of an erroneous commitment and pronounced that "an individual's interest in not being erroneously placed in an institution, and hence deprived of his liberty outweighed the state's interest in caring for mentally disturbed individuals, as well as protecting the rest of the populace" from the mentally ill.[135] In addition, the Court stated that the function of the legal process is to "minimize the risk of erroneous decisions,"[136] and declared that "individual[s] should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[137] Hence, the Court decided that the preponderance standard should not be used, as the potential error in using it severely jeopardizes important individual liberty interests.[138]

The *Addington* Court rejected the reasonable-doubt standard as well. The Court distinguished civil commitment proceedings from criminal prosecutions, as a civil commitment does not have the same impact as a criminal trial.[139] As opposed to the punitive nature of a criminal proceeding, a civil commitment aims to provide medical care to the individual;[140] the State's interest is not merely to protect society, but also to protect the individual from himself and to offer rehabilitation.[141] Furthermore, the reasonable-doubt standard has historically been reserved for criminal cases, and applying such

131. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1976); *see also In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973).

132. *See* Rabaut, *supra* note 4, at 659.

133. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

134. *Id.*

135. Alaya B. Meyers, *Rejecting the Clear and Convincing Evidence Standard for Proof of Incompetence*, 87 J. CRIM. L. & CRIMINOLOGY 1016, 1035 (1997) (quoting Addington v. Texas, 441 U.S. 418, 426 (1979)).

136. Addington v. Texas, 441 U.S. 418, 425 (1979).

137. *Id.* at 427.

138. *See* Brennan, *supra* note 4, at 1822.

139. Meyers, *supra* note 135, at 1019.

140. Lawrence M. Kopeikin, *Conservatorship of Roulet and Cramer v. Tyars: Inconsistency in Involuntary Civil Commitment Protections*, 68 CAL. L. REV. 716, 723-24 (1980).

141. *Id.* at 728-29.

a high standard might prevent the state from fulfilling its goals.[142] The Court did not want an overly broad use of the reasonable-doubt standard to harm the special moral force[143] that this standard brings to criminal law.

Additionally, the principle in criminal proceedings that a guilty man should go free rather than an innocent man be convicted does not apply to civil commitments. Not committing a mentally ill person might have graver consequences than not convicting a guilty man, as he will not receive the treatment he needs. Another major difference is that criminal proceedings require determination of past factual events, while commitment proceedings require a determination of future dangerousness that must be established by medical testimony. Due to the lack of certainty in medical diagnosis, the State may never be able to meet the reasonable-doubt standard. This might lead to a failure to commit individuals who need medical treatment.[144]

On the other hand, given the limitations of psychiatry and psychology which are not exact sciences, we must conclude that the low standard of proof is not adequate. Psychiatry is not developed enough to reliably predict the outcome of a failure to commit a mentally ill person or to establish the degree of his dangerousness. The psychiatric diagnosis might reflect factors that are irrelevant to the case; the person who orders the commitment might be influenced by the disabled person's age, sex, or status in society.[145] Accordingly, the low standard is not sufficient, as it may lead to a high rate of erroneous commitments.

The *Addington* Court finally adopted the clear-and-convincing standard, stating that it strikes a fair balance between the rights of the individual and the legitimate concerns of the State.[146] This case has put an end to semantic exercises in procedural nomenclature in the area of due-process requirements for involuntary commitments. By establishing the minimum requirements, the U.S. Supreme Court has allowed the individual states the freedom to determine higher standards.[147] Courts must now weigh the relative interests of the State and the individual in light of the effect of the procedure imposed. And in cases of involuntary commitments, the U.S. Supreme Court has already stated that the required standard is the clear-and-convincing standard. The practical significance of this ruling is that facts asserted must be found highly probable and that a lower probability is insufficient when individuals are involuntarily committed.

142. *Id.* at 730.
143. *See* 441 U.S. at 428.
144. Rabaut, *supra* note 4, at 663.
145. BEN-DROR, *supra* note 123, at 168-69.
146. 441 U.S. at 431.
147. Rabaut, *supra* note 4, at 670.

2. *Involuntary Commitments in Israel*

The treatment of mentally ill individuals in general, and the involuntary commitment issue in particular, are regulated by the Israeli Treatment of Mentally Ill Act of 1991 (Mentally Ill Act), which replaced the former Act of 1955.[148] The Mentally Ill Act reflects a liberal commitment to individual rights, as well as to the protection of the mentally ill. The Israeli Legislature preferred what has been termed the "Judicial Approach,"[149] which focuses on the individual's liberties, and demands the establishment of a judicial basis for every decision to commit a person. The Judicial Approach conflicts with the "Medical-Paternalistic Approach," which emphasizes society's duty to take care of individuals in need and justifies involuntary confinement based on medical considerations.[150] Protecting an individual's rights and liberties became much more important in Israel after the enactment of the Basic Law: Human Dignity and Liberty, which established the individual's fundamental right to liberty and privacy (the very rights that are jeopardized when one is faced with involuntary commitment).[151] Indeed, the Mentally Ill Act was legislated before the Basic Law: Human Dignity and Liberty, and therefore, although the latter cannot be applied directly, the Mentally Ill Act should be interpreted according to its spirit.

Influenced by the trend emphasizing individual's rights, the Mentally Ill Act added the requirement of a medical examination, which must be performed as a condition for involuntary commitment.[152] Moreover, the Mentally Ill Act established that an order to commit a person may only be issued if a degree of "certainty" exists and requires that alternative and less severe means be utilized, if possible.[153] In addition, the possibility of appealing to the Psychiatric Committee has been broadened.[154] The Mentally Ill Act states that the main goal of confinement is to ensure that mentally ill persons receive medical treatment.[155] Furthermore, a person cannot be committed only in the name of protecting the individual or society, or where the commitment is not found to be in accordance with the provisions mentioned in the Act.[156]

The District Psychiatrist is the main authority regarding involuntary commitment in Israel. Provided that the conditions set forth in the Act are fulfilled, he may order an urgent or a non-urgent examination[157] and an ur-

148. Treatment of Mentally Ill Act, 1991 S.H. 58 (Isr.) [hereinafter Mentally Ill Act].
149. BEN-DROR, *supra* note 123, at 158-59.
150. *Id.*
151. Mentally Ill Act, *supra* note 148, § 12.
152. *Id.* § 26.
153. *Id.* § 35(c).
154. *Id.* § 12.
155. *Id.* § 35.
156. H.C. 1025/92, Plonit [Doe] v. Attorney General, (1) P.M. 410, 426 (1993).
157. Mentally Ill Act, *supra* note 148, §§ 6 & 7.

gent or a non-urgent involuntary commitment[158] for one week. He may also extend the confinement by one week. The Psychiatric Committee supervises the District Psychiatrist's decisions and decides appeals.[159] The decisions of the medical authorities are subjected to the Court's judicial review.[160] The Court examines the procedures, the factual basis for commitment decisions, and reliability of the procedures.

While a voluntary commitment[161] requires the committed person's conscious consent and a psychiatric examination, involuntary commitment can be executed only if the examination has been held and specific requirements are met. Involuntary commitments require the following: (1) the subject refuses the commitment of free will; (2) he displays derogated judgment or understanding of reality, as caused by the illness; and (3) one of the legal causes for commitment is present.[162]

Section seven-two of the Mentally Ill Act gives the District Psychiatrist the authority to order non-urgent commitments.[163] Furthermore, the District Psychiatrist has the authority to order an urgent involuntary commitment when the person "might put himself or others in an immediate physical danger."[164] Before ordering an urgent commitment, the person must undergo an examination, and the District Psychiatrist has to be "convinced" that all the legal requirements have been fulfilled and that the commitment is necessary.[165]

Prior to the Mentally Ill Act, there was no clear standard of proof or declaration of the nature of the evidence required in commitment proceedings,[166] so these matters fell to the District Psychiatrist's discretion and jurisdiction. This highly unacceptable situation was criticized when it was argued that given the low degree of accuracy (and all other limitations) of psychiatry, the standard of proof required to demonstrate the dangerousness of a person should be determined by the law and not by psychiatrists, who will tend to decide by the lowest standard of proof.[167] Today, the District Psychiatrist does not freely determine the standard of proof. The psychiatrist's "conviction" has to be based on objective evidence, and not on simple evaluation.[168] The "conviction" must be based on a physical examination because, without it, the facts considered will not be firsthand, and the patient will not

158. *Id.* § 9.
159. *Id.* § 12
160. *Id.*
161. *Id.* § 4.
162. BEN-DROR, *supra* note 123, at 175-76.
163. *Id.* at 212-19.
164. Mentally Ill Act, *supra* note 148 § 6(2).
165. *Id.* § 9.
166. Adi Parush, *The Grounds for Involuntary Commitment of the Mentally Ill in Israeli Law*, 13 MISHPATIM 377, 384 (1984) (Hebrew).
167. Shnit, *supra* note 124, at 549.
168. Plonit [Doe] v. Attorney General (not yet published).

be given the opportunity to explain his actions.[169] The purpose of the "conviction" standard is to assure a higher degree of certainty in predicting future behavior. The commitment should require specific facts, such as past violent incidents. Secondhand evidence (such as testimony of relatives and social workers) cannot be applied, as before.[170]

The Israeli Supreme Court has not yet discussed directly the meaning of "dangerousness," but it seems that the narrow interpretation of "immediate danger of severe violence,"[171] which outweighs the individual's liberty, should be applied. In protecting the individual's rights, the Mentally Ill Act also applies "The Least Restrictive Alternative Principle," which states that as long as the purpose of commitment can be achieved in any other way that less severely harms the individual's liberty, the individual should not be committed.[172]

Pursuant to the Mentally Ill Act, the requirement of "might endanger himself or others"[173] must be established according to the standard of "high probability," "likely possibility," or "substantial fear."[174] These standards are very close to the American standard of "clear and convincing evidence."[175]

In conclusion, a trend to elevate individual's rights over paternalistic considerations is evident in Israel. The same trend can be seen in the U.S. courts. Yet, the standard of proof required in Israel has not been as clearly determined. At the same time, the Israeli courts have already applied a standard close to the American one. In addition, Israeli courts must consider the guarantees of rights and liberties in the Basic Law: Human Dignity and Liberty and the constitutional revolution. After balancing all the interests involved, the clear conclusion is that an intermediate standard of proof, similar to that of "clear and convincing evidence," should be applied in cases of involuntary commitment.

B. Deportation Hearings

In the United States, an alien who is the subject of deportation proceedings will not be deported to a country in which the alien's life or freedom might be threatened.[176] The U.S. Supreme Court interpreted the relevant Section of the Immigration and Nationality Act (Immigration Act) as requiring

169. H.C. 1025/92, Plonit [Doe] v. Attorney General, (1) P.M. 410, 423 (1993).

170. BEN-DROR, *supra* note 123, at 191.

171. H.C. 219/79, Yarmalovich v. Hovav, 35 (3) P.D. 766, 778.

172. Parush, *supra* note 166, at 405.

173. Mentally Ill Act, *supra* note 148, §§ 6(2) & 7(2).

174. H.C. 1025/92, Plonit [Doe] v. Attorney General, (1) P.M. 410, 426 (1993).

175. Rimona Durst & Irit Meretyk, *Therapy versus Authority in Compulsory Hospitalization from the Clinician's Perspective*, 3 MISHPAT UMIMSHAL 119, 138 (1995) (Hebrew).

176. Immigration and Nationality Act § 243 (h), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1525 (1982)).

an alien to establish that it is more likely than not that he or she will be persecuted if deported to stay the deportation hearing.[177]

In *Woodby v. I.N.S.*,[178] the U.S. Supreme Court looked at two cases involving deportation orders for resident aliens. The Court concluded that the government must establish the facts supporting deportability by "clear, unequivocal, and convincing evidence."[179] Furthermore, the Court ruled that a state could terminate the liberty interests of persons subject to deportation only by a heightened standard.[180] The issue of deportation demands striking a balance between two conflicting policies of humanitarianism and protectionism. On the one hand, the United States stands for human rights and freedoms and has always kept the doors open to those seeking a better life. On the other hand, deportation is supported by some U.S. citizens because of their unemployment concerns and fears that a large influx of aliens could endanger the country's identity.[181]

1. The Deportation Procedure[182]

The deportation process is carried out in the U.S. under the jurisdiction of the Attorney General, who exercises his or her authority through the Immigration and Naturalization Service (I.N.S.). When the Attorney General decides on deportation, the alien is ordered to show cause against deportation in a hearing before an immigration judge.[183] The alien is allowed to present evidence, to cross-examine government witnesses, and to be represented by counsel.[184] The I.N.S. must establish deportability by clear, unequivocal, and convincing evidence.[185] If a deportation order is issued, the alien may appeal to the Board of Immigration Appeals and then may seek judicial review.[186]

2. The Alien's Burden of Proof Under Section 243(h)

During the hearing, the alien may ask to withdraw his deportation order under Section 243(h) of the Immigration Act.[187] The alien however, bears the burden of establishing the likelihood of persecution if deported. In most cases, the immigration judge requests the State Department's opinion of the

177. Immigration and Naturalization Service v. Stevic, 467 U.S. 407, 413 (1984).
178. 385 U.S. 276.
179. *Id.* at 286.
180. Meyers, *supra* note 135, at 1034-35.
181. Shaun Kathleen Healy, *The Alien's Burden of Proof Under Section 243(h): How Clear is Clear Probability?*, 17 IND. L. REV. 581, 581-82 (1984).
182. *Id.* at 585-88.
183. *Id.*
184. *Id.*
185. Woodby v. I.N.S., 385 U.S. 276, 286 (1984).
186. Healy, *supra* note 181, at 585-88.
187. *Id.*

likelihood of persecution in a particular country. The State Department's opinion, may be excluded from the hearing record in the interest of national security, if found to be confidential. Generally, attempts to cross-examine the authors of these opinions have been denied, and an alien, in actuality, has no opportunity to refute the opinion, especially when the information is confidential. Therefore, if the State Department renders an unfavorable opinion, it will be very difficult in most cases to meet the criteria for Section 243(h) of the Immigration Act. Moreover, the chance of refuting an unfavorable State Department opinion is unlikely, given that most aliens have very limited evidence-gathering resources and options.

The Refugee Act of 1980[188] amended Section 243(h) of the Immigration Act. The amended section now provides that "the Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[189] Given the grave consequences an alien might face upon deportation, an alien's request should be given fair consideration. Because an alien faces the difficult task of obtaining evidence that demonstrates his eligibility for Section 243(h) relief, the determination of the burden of proof is very important. Humanitarian principles are threatened when the standard of proof is set at unreachable heights. On the other hand, a very low standard of proof would allow any alien to escape deportation and such a situation could create havoc in the immigration procedure. One of the major changes with the amendment is that once 243(h) eligibility is established, the Attorney General must withhold deportation. Prior to the amendment, even after Section 243(h) was satisfied, the Attorney General had the discretion to go forward with the deportation.

As for the standard of proof, the Supreme Court in *I.N.S. v. Stevic* held that an alien must establish a "clear probability" that he will be subject to persecution.[190] The Court stated that the standard requires a showing that it is "more likely than not" the alien will be persecuted upon deportation.[191] It seems that the Court's language actually established a new standard, so that clear probability now simply requires the alien to show that persecution is more likely than not, in order to be afforded relief under the section.

IV. CONCLUSION

As the U.S. Supreme Court declared, "[i]n cases involving individual rights . . . 'the standard of proof [at a minimum] reflects the value society

188. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C. (1982)).

189. Healy, *supra* note 181, at 583 n.12 (quoting Refugee Act of 1980, 8 U.S.C. § 1253(h) (1982)).

190. Immigration and Naturalization Service v. Stevic, 467 U.S. 407, 413 (1984).

191. *Id.* at 424.

places on individual liberty'."[192] This ruling implicates the fundamental principle of due process, which recognizes that as the importance of the rights at stake increases, the extent of the procedural safeguards must increase. Thus, in a case involving an individual faced with losing a significant liberty interest due process requires a high degree of procedural protections.[193]

In my opinion, Israel should learn from the American experience and the U.S. Supreme Court's "clear-and-convincing standard" in cases of involuntary commitments and deportations, by establishing similar intermediate standards in cases involving human rights. On the one hand, in such cases the "preponderance-of-the-evidence standard" is not adequate, particularly in light of the fact that the decisive authority is not a court but an administrative authority. On the other hand, the "beyond-a-reasonable-doubt standard" will be too high, for instance in those cases where security concerns require the deprivation of a person's right and security considerations make it hard to prove those concerns to the highest degree.

The English Court has also discussed this issue of what standard to apply in such situations,[194] and stated in *Bater v. Bater*[195] that

> there is no absolute standard in either case. In criminal cases the charge must be proved beyond a reasonable doubt, but there may be degrees of proof within that standard . . . ; so also in civil cases. The case may be proved by preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter."[196]

It seems that, in the 1950s, the Israeli Supreme Court already adopted this approach. In *Greenwald*,[197] the Israeli Supreme Court held that there are no absolute standards, and the degree of proof required depends on the subject matter.[198] The Court stated that the criminal standard of "beyond a reasonable doubt" and the civil standard of "preponderance of the evidence" are not accurate formulas, but practical and convenient standards.[199] The degree of proof may differ from case to case according to the seriousness of the matter.[200] The Court thus acknowledged, a long time ago, the relative nature of standards of proof and the need for an intermediate standard. Further-

192. Addington v. Texas, 441 U.S. 418, 425 (1979) (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)). *See also* Kopeikin, *supra* note 140, at 730-31.

193. Brennan, *supra* note 4, at 1871.

194. ELIAHU HARNON, LAW OF EVIDENCE pt. 1, 216-17 (1973).

195. [1950] 2 All E.R. 458.

196. *Id.* at 459. The English Court repeated this approach in later cases. Hornal v. Neuberger Products, Ltd. [1956] 3 All E.R. 970, 973, 976-77; Blyth v. Blyth [1966] 1 All E.R. 524, 529.

197. Cr.A. 232/55, Attorney General v. Greenwald, 12 P.D. 2017 (1955).

198. *Id.* at 2063.

199. *Id.*

200. *Id.*

more, the Court has adopted such intermediate standards in civil cases involving the protection of human rights.

In the *Laor* case, the Israeli Supreme Court reviewed the Films and Plays Review Board's decision to restrict the display of a play that might invoke negative sentiments.[201] The Board decided to restrict the play because it compared the Israeli army to Nazi forces (a depiction that would no doubt anger the Jewish population in Israeli and portray the Israeli government in an unfavorable light). The Court stated that the appropriate balance between the public's interests and the individual's freedom of speech demands that freedom of speech be curtailed only when the damage caused to public order would be severe, harsh, and serious.[202] As for the authority of the Board, the Court required the "close certainty" standard to be established before it could restrict the freedom of speech.[203]

In the recent case of *Senesh v. Broadcasting Authority,*[204] the Israeli Supreme Court discussed again the appropriate balancing between the freedom to create and the freedom of speech, on the one hand, and the public's interest in order, on the other. The Court stated that there is not just one balancing formula between contradicting interests; rather, the formula differs according to the interests involved.[205] The Court held once again that only severe, harsh, and serious damage to public sentiment may justify the limitation of the freedom of speech. The Court required that the probability of the occurrence of this damage must meet the "close certainty" standard. The Court, however, held that in unique and exceptional circumstances, "reasonable probability" may suffice.[206]

From all of the above, it may be concluded that the Israeli Supreme Court has already utilized intermediate standards and has acknowledged the possibility of applying different standards, depending upon the circumstances and the human right that is at stake. Therefore, it does not seem too demanding to require the Israeli administrative authorities, the very authorities that are often called upon to determine the fate of human rights, to strike the appropriate balance before depriving an individual's rights or liberty. Considering their duty to respect and protect individual's rights, those authorities should be compelled to utilize the proper intermediate standard of proof, which should be determined, as described, in light of the right or liberty at stake.

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201. H.C. 14/86, Laor v. Theater Review Board, 41 (1) P.D. 421.
202. *Id.* at 435.
203. *Id.* at 436.
204. H.C. 6126/94, Senesh v. Broadcasting Authority 53(3) P.D. 817.
205. *Id.* at 833-34.
206. *Id.* at 837-38.